**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

FCA US, LLC
a Delaware Limited Liability Company,

Plaintiff,

Case No. ____________

v.

Jury Trial Demanded

CAPITAL ACQUISITIONS, LLC
a Minnesota Limited Liability Company,

and

DUSTIN NIKITUK, d/b/a Capital
Acquisitions and Dealership Closeouts,
an individual resident of the
State of Minnesota

Defendants

COMPLAINT

FCA US, LLC ("FCA US") brings this complaint against Capital Acquisitions, LLC ("Capital Acquisitions") and Dustin Nikituk ("Nikituk") (collectively, "Defendants") for copyright infringement and breach of contract. As the bases for its Complaint, FCA US states as follows:

THE PARTIES

1. Plaintiff FCA US is a Delaware Limited Liability Company having a principal place of business at 1000 Chrysler Drive, Auburn Hills, Michigan 48326-2766.

2. On information and belief, Defendant Capital Acquisitions is a Minnesota Limited Liability Company.

3. On information and belief, Capital Acquisitions has a place of business at 13091 Central Avenue NE, Blaine, Minnesota 55434.

4. On information and belief, Capital Acquisitions has a place of business at 2746 118th Circle, Blaine, MN 55449.

5. On information and belief, Defendant Dustin Nikituk is an individual residing at 11548 Dunkirk Ct. NE, Blaine, Minnesota 55449.

JURISDICTION AND VENUE

6. This action arises under 17 U.S.C. §101 et seq. for infringement of copyrights owned by FCA US and under Michigan state law for breach of contract.

7. This Court has subject matter jurisdiction over the copyright infringement claims pursuant to 28 U.S.C. §§ 1331, 1332(a) and 1338(a). This Court has subject matter jurisdiction over the state law breach of contract claim pursuant to 28 U.S.C. §1367(a).

8. This Court has personal jurisdiction over Defendants because Defendants have transacted business in Michigan by among other things marketing, distributing, providing, offering for sale, selling and/or installing products, including products that are the subject of this lawsuit, in Michigan, including in this judicial district, such as through the interactive website at www.dealershipcloseouts.com and/or www.the-tech-authority.com.

9. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)(2), 1391(c)(2), 1391(d).

GENERAL FACTUAL BACKGROUND

FCA US and the wiTECH System

10. FCA US is a leading manufacturer of automobiles, including under the following brands: Chrysler®, Jeep®, Dodge®, Ram® and FIAT®.

11. FCA US developed a system for diagnosing certain conditions of its Chrysler®, Jeep®, Dodge® and Ram® vehicles called wiTECH.

12. The wiTECH system includes a wiTECH VCI POD (either a VCI POD, also known as wiPOD, or a Micro POD II) and the wiTECH Diagnostic Application software.

13. The wiTECH VCI POD is a hardware component that is configured to plug into the on-board diagnostics (OBD)-II systems of Chrysler®, Jeep®, Dodge®, Ram®, and FIAT® vehicles.

14. The wiTECH Diagnostic Application is software that is intended to be installed on a personal computer.

15. The wiTECH VCI POD communicates data that it retrieves from the vehicle's (OBD)-II system to the personal computer and the wiTECH Diagnostic Application, and the wiTECH Diagnostic Application communicates data to the wiTECH VCI POD through the personal computer.

16. FCA US also developed a wiTECH stub installer program, which is used to facilitate the download and installation of the wiTECH Diagnostic Application onto a personal computer.

17. FCA US is the sole owner of all copyrights directed to the wiTECH Diagnostic Application and the wiTECH stub installer program.

18. Two authorized vendors, namely AE Tools and SolvIT, market and license the wiTECH systems to non-dealer automotive repair shops and other non-dealer customers under authorization from FCA US.

19. Upon purchase of a license to a wiTECH system by a non-dealer customer, AE Tools or SolvIT (as applicable) facilitates the wiTECH Diagnostic

Application being downloaded and installed by the non-dealer customer on the non-dealer customer's personal computer.

20. AE Tools and SolvIT facilitate the download and installation of the wiTECH Diagnostic Application by sending an email to the non-dealer customer, which includes a temporary link that allows the non-dealer customer to download the wiTECH stub installer program.

21. The non-dealer customer activates the temporary link, which enables the non-dealer customer to download and run the wiTECH stub installer program.

22. The wiTECH stub installer program causes the non-dealer's personal computer to download and install the most recent version of the wiTECH software onto the non-dealer customer's computer.

23. Prior to installation of the wiTECH stub installer program in the first instance and the wiTECH Diagnostic Application in the second instance, the user of the personal computer is presented with an on-screen End User License Agreement (FCA US' "EULA"). A true and correct reproduction of the screen displaying FCA US' EULA to a user is set forth in Exhibit 1. A true and correct copy of the full FCA US EULA is attached hereto as Exhibit 2.

24. The user must accept the terms of FCA US' EULA – by selecting "I accept the terms in the license agreement" on the display screen each time – before

the wiTECH stub installer program and/or the wiTECH Diagnostic Application will be installed on the user's personal computer.

25. Once the user accepts the terms of FCA US' EULA, the wiTECH stub installer program and the wiTECH Diagnostic Application are installed on the user's personal computer.

26. Once installed, the wiTECH Diagnostic Application includes a function to periodically verify that the wiTECH VCI POD that provides data to the wiTECH Diagnostic Application is properly licensed.

27. To accomplish this function, the wiTECH Diagnostic Application periodically accesses via the internet connection of the user's personal computer a database maintained by FCA US of unique identification numbers associated with all wiTECH VCI PODS, and, whether each wiTECH VCI POD is properly licensed or not.

28. If the unique identification number of the wiTECH VCI POD associated with the wiTECH Diagnostic Application is indicated as unlicensed in the database, then the wiTECH Diagnostic Application is configured to cease receiving and sending data to the unlicensed wiTECH VCI POD, rendering the unlicensed wiTECH VCI POD inoperable with the wiTECH Diagnostic Application.

Defendants

29. Nikituk created or caused to be created a limited liability company called Capital Acquisitions, LLC.

30. Nikituk acts as the Manager of Capital Acquisitions.

31. Capital Acquisitions conducts business under the name "Dealership Closeouts."

32. Nikituk conducts business under the name "Dealership Closeouts."

33. Nikituk registered the domain name www.dealershipcloseouts.com.

34. The www.dealershipcloseouts.com domain name is used in connection with a business known as "Dealership Closeouts."

35. In association with the registration of www.dealershipcloseouts.com, Nikituk is identified as the "Registrant Contact", the "Admin Contact" and the "Tech Contact". Exhibit 3.

36. In association with the registration of www.dealershipcloseouts.com, Capital Acquisitions is identified as the "Registrant Organization." *Id.*

37. In association with the registration of www.dealershipcloseouts.com, Capital Acquisitions is indicated as having an address at 2746 118th Circle, Blaine, MN 55449. *Id.*

38. Nikituk either owns or previously owned a residence at 2746 118th Circle, Blaine, MN 55449.

39. In association with the registration of www.dealershipcloseouts.com, the telephone number of Capital Acquisitions is listed as 507-272-0896. *Id.*

40. The www.dealershipcloseouts.com website lists 507-272-0896 as the contact number. Exhibit 4.

41. The telephone number 507-272-0896 is a cellular telephone number that is either owned by or was previously owned by Nikituk.

42. Defendant Capital Acquisitions further conducts business through the interactive website www.the-tech-authority.com. Exhibit 5.

43. Defendants, conducting business as "Dealership Closeouts" and through the websites www.dealershipcloseouts.com and www.the-tech-authority.com are in the business of selling new and used automotive diagnostic equipment and shop tools.

44. Defendants advertise, offer for sale, and sell, among other products, wiTECH systems, including wiTECH VCI PODs and the wiTECH Diagnostic Application, through the www.dealercloseouts.com and www.the-tech-authority websites.

45. Defendants are not authorized by FCA US to sell wiTECH VCI PODs or the wiTECH Diagnostic Application.

46. Defendants acquire some or all of the wiTECH VCI PODs that they sell on www.dealershipcloseouts.com and www.the-tech-authority.com through sources other than FCA US' authorized vendors, SolvIT and AE Tools.

47. When a customer purchases a wiTECH system from Defendants, Defendants, including agents working at the direction of Defendants, cause a copy of the wiTECH Diagnostic Application to be installed on the customer's personal computer.

48. Upon information and belief, Defendants have possession of a copy of the wiTECH Diagnostic Application in the form that it was released by FCA US (the "Released Copy of the wiTECH Diagnostic Application").

49. Upon information and belief, Defendants have modified and/or altered the copy of the wiTECH Diagnostic Application (the "Altered Copy of the wiTECH Diagnostic Application") such that, when installed on a personal computer, either in part or in full, it does not periodically verify that the associated wiTECH VCI POD is properly licensed.

50. Consequently, the Altered Copy of the wiTECH Diagnostic Application, when installed on a personal computer, either in part or in full, permits unlicensed wiTECH VCI PODs to function properly and be used with the wiTECH Diagnostic Application, contrary to the intended functionality of the wiTECH VCI PODs and wiTECH Diagnostic Application.

51. Upon information and belief, Defendants have possession of a copy of the wiTECH stub installer program in the form that it was released by FCA US.

52. Upon information and belief, Defendants, including agents working at the direction of Defendants, have installed the wiTECH Diagnostic Application on customers' computers by remotely accessing customers' computers and installing the wiTECH Diagnostic Application on the customers' computers from the Released Copy of the wiTECH Diagnostic Application and/or the Altered Copy of the wiTECH Diagnostic Application in the possession of Defendants.

53. Upon information and belief, Defendants, including agents working at the direction of Defendants, have installed the wiTECH Diagnostic Application on multiple computers (owned by the same or different customers) from the same Released Copy of the wiTECH Diagnostic Application and/or the same Altered Copy of the wiTECH Diagnostic Application in the possession of Defendants.

54. Upon information and belief, Defendants, including agents working at the direction of Defendants, have installed the wiTECH stub installer program on customers' computers by remotely accessing customers' computers and installing the wiTECH stub installer program in the possession of Defendants.

55. Upon information and belief, Defendants, including agents working at the direction of Defendants, have installed the wiTECH Diagnostic Application on

multiple computers (owned by the same or different customers) from the same copy of the wiTECH stub installer program in the possession of Defendants.

COUNT I

BREACH OF FCA US' EULA

56. FCA US repeats and incorporates herein each of the preceding paragraphs.

57. FCA US' EULA (Exhibit 2) states that it is an agreement between Chrysler Group LLC and a person who selects the option "I accept the terms in the license agreement" on the display screen during installation of the wiTECH stub installer program and/or the wiTECH Diagnostic Application, as applicable.

58. The name of Chrysler Group LLC was changed to FCA US LLC on December 15, 2014.

59. Defendants, including agents working at the direction of Defendants, selected the option "I accept the terms in the license agreement" during an installation of the wiTECH Diagnostic Application from the copy of the Release Copy of the wiTECH Diagnostic Application file in the possession of Defendants.

60. Defendants accepted and became bound by the terms in FCA US' EULA with respect to the wiTECH Diagnostic Application file(s) in the possession of Defendants.

61. Defendants, including agents working at the direction of Defendants, selected the option "I accept the terms in the license agreement" during an installation of the wiTECH stub installer from the copy of the wiTECH stub installer file in the possession of Defendants.

62. Defendants accepted and became bound by the terms in FCA US' EULA with respect to any and all copies of the wiTECH stub installer program in the possession of Defendants.

63. FCA US' EULA is a valid contract for consideration and enforceable by FCA US against Nikituk.

64. FCA US' EULA is a valid contract for consideration and enforceable by FCA US against Capital Acquisitions.

65. Paragraph 1 of FCA US' EULA provides a person who has accepted the terms of FCA US' EULA the right to "install the client portion of the enclosed SOFTWARE on personal computers that you own or lease and use it with the wiTECH™ VCI Pod(s) or STARMOBILE™ diagnostic tool(s) which you have purchased, leased, or are otherwise authorized to use for servicing Chrysler vehicles…"

66. Paragraph 2 of FCA US' EULA states, among other things, that "[T]he rights granted to you are limited to those stated in this Software License Agreement and do not constitute a sale of the SOFTWARE."

67. Paragraph 3 of FCA US' EULA states, among other things, that a licensed user "may not, in whole or in part, alter, copy, photocopy, reproduce, translate, merge, modify, derive source code from, disassemble, decompile or create derivative works of the SOFTWARE…"

68. The "Software" that is subject to FCA US' EULA includes each of: (i) the wiTECH stub installer; and (ii) the wiTECH Diagnostic Application, as applicable.

69. Subsequent to accepting and becoming bound by the terms of FCA US' EULA with respect to the wiTECH Diagnostic Application, Defendants modified and/or altered and/or made derivative works of the Released Copy of the wiTECH Diagnostic Application to create the Altered Copy of the wiTECH Diagnostic Application without the consent of FCA US and in violation of paragraph 3 of FCA US' EULA.

70. Subsequent to accepting and becoming bound by the terms of FCA US' EULA, Defendants, including agents acting at the direction of Defendants, copied and/or reproduced a Released Copy of the wiTECH Diagnostic Application in the possession of Defendants to the personal computers of Defendants' customers without the consent of FCA US and in violation of paragraph 3 of FCA US' EULA.

71. Subsequent to accepting and becoming bound by the terms of FCA US' EULA, Defendants, including agents acting at the direction of Defendants, copied and/or reproduced an Altered Copy of the wiTECH Diagnostic Application to the personal computers of Defendants' customers without the consent of FCA US and in violation of paragraph 3 of FCA US' EULA.

72. Subsequent to accepting and becoming bound by the terms of FCA US' EULA, Defendants, including agents acting at the direction of Defendants, copied and/or reproduced a copy of the wiTECH stub installer program in the possession of Defendants to the personal computers of Defendants' customers without the consent of FCA US and in violation of paragraph 3 of FCA US' EULA.

73. Therefore, Defendants have breached FCA US' EULA.

74. FCA US has been damaged as a result of Defendants' breach of FCA US' EULA.

COUNT II

75. FCA US repeats and incorporates herein each of the preceding paragraphs.

76. FCA US developed and/or had developed at its direction the source code for the wiTECH Diagnostic Application.

77. The wiTECH Diagnostic Application is an original work.

78. FCA US is the sole owner of all copyrights directed to the wiTECH Diagnostic Application.

79. FCA US is the sole owner of United States Copyright Registration No. TX 8-306-755 for the wiTECH Diagnostic Application. Exhibit 6.

80. By the above-described actions, Defendants have reproduced the wiTECH Diagnostic Application without the consent or authorization of FCA US.

81. By the above-described actions, Defendants have prepared derivative works based upon the wiTECH Diagnostic Application without the consent or authorization of FCA US.

82. By the above-described actions, Defendants have distributed copies of the wiTECH Diagnostic Application by sale or other transfer of ownership, or by rental, lease or lending without the consent of FCA US.

83. Therefore, Defendants have infringed the copyrights of FCA US in the wiTECH Diagnostic Application in violation of 17 U.S.C. 501 and 17 U.S.C. §106(1), (2) and (3).

84. Defendants have infringed FCA US' copyrights in the wiTECH Diagnostic Application willfully and intentionally.

85. FCA US has been damaged by Defendants' infringement of FCA US' copyrights in the wiTECH Diagnostic Application.

COUNT III

86. FCA US repeats and incorporates herein each of the preceding paragraphs.

87. FCA US developed and/or had developed at its direction the source code for the wiTECH stub installer program.

88. The wiTECH stub installer program is an original work.

89. FCA US is the sole owner of all copyrights directed to the wiTECH stub installer program.

90. FCA US is the sole owner of a United States Copyright Registration No. TX 8-297-180 for the wiTECH stub installer program. Exhibit 7.

91. By the above-described actions, Defendants have reproduced the wiTECH stub installer program without the consent or authorization of FCA US.

92. By the above-described actions, Defendants have distributed copies of the wiTECH stub installer program by sale or other transfer of ownership, or by rental, lease or lending without the consent of FCA US.

93. Therefore, Defendants have infringed the copyrights of FCA US in the wiTECH stub installer program in violation of 17 U.S.C. 501 and 17 U.S.C. §106(1) and (3).

94. Defendants have infringed FCA US' copyrights in the wiTECH stub installer willfully and intentionally.

95. FCA US has been damaged by Defendants' infringement of FCA US' copyrights in the wiTECH stub installer program.

PRAYER FOR RELIEF

WHEREFORE, FCA US prays for relief as follows:

A. For a judgment determining that Defendants, jointly and severally, have breached FCA's EULA;

B. For a judgement determining that Defendants, jointly and severally, have infringed FCA US' copyrights in the wiTECH Diagnostic Application in violation of 17 U.S.C. §501;

C. For a judgment determining that Defendants, jointly and severally, have infringed FCA US' copyrights in the wiTECH stub installer program in violation of 17 U.S.C. §501;

D. For a judgment determining that Defendants' infringement of FCA US' copyrights in the wiTECH Diagnostic Application and the wiTECH stub installer program has been willful and intentional;

E. For a judgment awarding FCA US money damages against Defendants, jointly and severally, in an amount to compensate FCA US for its actual damage resulting from Defendants' breach of FCA US' EULA;

F. For a judgment awarding FCA US its actual damages and any and all profits of Defendants as permitted under 17 U.S.C. §§ 504;

G. For a judgment preliminarily and permanently enjoining and restraining Defendants, jointly and severally, including their officers, directors, employees, agents and servants, and all those in active concert of participation with any of them, from directly or indirectly infringing FCA US' copyrights in the wiTECH Diagnostic Application and/or the wiTECH stub installer program;

H. For a judgment awarding FCA US any other damages to which it is entitled under statute or the common law;

I. For a judgment awarding FCA US its attorneys' fees;

J. For a judgment awarding FCA US punitive damages as authorized by law; and

K. For such other and further relief as the Court deems just and proper.

DEMAND FOR A JURY TRIAL

FCA US hereby demands a trial by jury in this action.

Dated: April 4, 2017

Respectfully submitted,

By: /s/Glenn E. Forbis
Glenn E. Forbis (P52119)
J. Bradley Luchsinger (P76,115)
Harness, Dickey & Pierce PLC
5445 Corporate Drive, Suite 200
Troy, MI 48098
248-641-1600
gforbis@hdp.com
bluchsinger@hdp.com

Counsel for Plaintiff

21032425.1